IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

WARDELL L. GILES, Plaintiff, V. RICK KEARNEY, DEAN J. BLADES, GARY CAMPBELL, AMY WHITTLE, ROBERT J. CASSASE, SGT. CHARLES STEELE, SGT LLOYD, C/O JUSTICE, C/O MILLIGAN, and C/O ACKENBRACK, Defendants.	)	Civ. No. 02-1674-SLR

Wardell L. Giles, Delaware Correction Center, Smyrna, Delaware. Pro se Plaintiff.

Susan D. Mack, Deputy Attorney General, Wilmington, Delaware. Counsel for State Defendants.

Kevin J. Connors, Esquire, Wilmington, Delaware. Counsel for Defendant Whittle.

MEMORANDUM OPINION

Dated: June 28, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Wardell L. Giles, presently incarcerated at Morris Community Correction Center ("MCCC") in Dover, Delaware, filed this action on November 13, 2002, against Warden Richard Kearney, Sergeant Gary Campbell, Sergeant Robert Cassase, Sergeant Charles Steele, Sergeant Keith Lloyd, Corporal Dean Blades, Correctional Officer Michael Milligan, Correctional Officer Rick Justice, and Correctional Officer Michael Ackenbrack (collectively "State defendants"), as well as medical contractor employee Amy Whittle. (D.I. 2) Plaintiff alleges constitutional violations arising from alleged use of excessive force at the Sussex Correctional Institution ("SCI") in Georgetown, Delaware, pursuant to 42 U.S.C. § 1983. (Id.) Currently before the court is State defendants' motion for summary judgment as well as defendant Whittle's motion to dismiss for failure to state a claim upon which relief can be granted. (D.I. 44; D.I. 53) For the reasons that follow, State defendants' motion is granted in part and denied in part, and defendant Whittle's motion is granted.

II. BACKGROUND

A. Facts Related to Alleged Use of Excessive Force

On November 27, 2001, plaintiff was transferred to SCI from the Roxbury Correctional Institution in Hagerstown, Maryland, in order to stand trial on criminal charges. (D.I. 55 at A5)

During the booking and receiving process, plaintiff was asked to remove his clothing in order to be searched and was told to take a shower. (Id. at A20) After defendant Blades informed plaintiff that it was against institutional policy to wear a "kufi" on his head, plaintiff reluctantly handed it to defendant Blades. (Id. at A5) Plaintiff claims that he remained cooperative throughout the procedure. His claim is contradicted by State defendants' incident reports which state that plaintiff was verbally abusive and defiant throughout the process. (Id. at A20-A36)

Once in the shower, plaintiff had difficulty operating the water and defendant Blades entered the shower in order to show plaintiff how to operate it. (Id. at A30) A verbal dispute ensued between plaintiff and defendant Blades during which plaintiff alleges defendant Blades called him "nigger." Plaintiff responded by calling defendant Blades a "skinhead." (Id. at A7) State defendants' incident reports indicate that plaintiff repeatedly and profanely refused to take a shower. (Id. at A20) In response to the verbal dispute, defendant Blades sprayed "capstun", a pepper spray, on plaintiff. (Id.) Although plaintiff denies striking defendant Blades, State defendants' incident reports indicate that plaintiff became combative and struck defendant Blades' face with his fist. (Id. at A20, A8) At this point, defendants Blades and Campbell wrestled plaintiff

to the floor, and defendant Blades kept his weight across plaintiff's back and legs until plaintiff was secured by defendants Cassase and Steele. (Id. at A24) Plaintiff alleges he was kicked and beaten because he was unable to heed State defendants' orders to place his hands behind his back due to the weight on his back and his inability to breathe. (Id. at A8) Plaintiff was eventually handcuffed and shackled. (Id. at A10) Plaintiff alleges that he was then ordered to clean up the blood and capstun residue with a mop while he was handcuffed. (Id.) State defendants deny ordering plaintiff to clean up the area. (D.I. 54 at 6) Plaintiff was taken to the infirmary and examined by defendant Whittle, who told him he was "fine." Plaintiff was then placed in a cell in the infirmary. (Id. at A11)

Later that day, plaintiff awoke in the cell and began banging on the door in an attempt to receive medical attention. Responding to this disturbance, defendants Ackenbrack, Lloyd, Milligan, and Justice entered the cell and again sprayed capstun on plaintiff. (Id. at A10-A12) Plaintiff alleges defendant Milligan held his mouth open while spraying an entire can of capstun in plaintiff's mouth, that he was struck on the head by one of the defendants, and that he was left lying on the floor of the cell. (Id. at A11) State defendants' incident reports do not contain any reference to this second incident. (D.I. 55 at A20-A36)

Plaintiff received x-rays the following day, November 28, 2001, and was transported to a local hospital where he received surgery and treatment for a collapsed lung, a broken rib and multiple contusions.[1] (Id. at A15) Plaintiff was returned to SCI on December 2, 2001. (Id. at A 16)

B. Assault Proceedings Against Plaintiff

For his conduct on November 27, 2001, plaintiff was charged with assault on a staff member. He was found guilty of that charge in an administrative disciplinary hearing conducted on December 7, 2001. (Id. at A50) Plaintiff's appeal of that administrative decision was denied and the decision affirmed. (Id. at A46) Subsequently, on July 29, 2002, in the Superior Court of Delaware in Sussex County, plaintiff pled no contest to criminal charges of assault in the third degree for the incident on November 27, 2001.[2] (Id. at A39) On December 11, 2002, plaintiff was transferred from SCI to Delaware Correctional Center ("DCC"). (Id. at A1)

C. Grievances Filed by Plaintiff

On June 24, 2002, and June 25, 2002, while incarcerated at DCC, plaintiff filed grievances related to the alleged assault at

[1]The record contains no indication of which incident caused the specific injuries suffered by plaintiff.

[2]Plaintiff stated at this proceeding that he understood the no contest plea was an incriminating plea and meant he did not challenge the sufficiency of the State's case to prove guilt beyond a reasonable doubt. (Id. at A38)

SCI on November 27, 2001. (Id. at A65) These grievances were rejected because they dealt with classification issues, which have their own appeal process. Further, because the grievances related to events occurring at SCI, plaintiff was instructed to send his grievances to SCI. (Id.) Plaintiff filed a grievance with SCI on July 30, 2002. (Id. at A55) Lieutenant Michael Atallian, the grievance officer at SCI, stated in his affidavit that "the log indicates the grievance was resolved against plaintiff on August 20, 2002, at Level 5, which means it was closed due to inmate's transfer" to Maryland.[3] (Id.) However, plaintiff alleges that he received no response to this grievance. (D.I. 59 at 1) The inmate grievance procedure in place at SCI and DCC require that the grievant complete a grievance form within seven calender days following the incident. (Id. at A55, A66) However, there is no reference in the record regarding the consequences of plaintiff's failure to file the grievance within the proper time period. (Id. at A55)

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party

[3]As noted above, plaintiff is presently incarcerated at MCCC in Dover, Delaware.

is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving

party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In analyzing a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Where the plaintiff is a pro se litigant, the court has an obligation to construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 520-521 (1972); Gibbs v. Roman, 116 F.3d 83, 86 n.6 (3d Cir. 1997); Urrutia v. Harrisburg County Police Dep't., 91 F.3d 451, 456 (3d Cir. 1996). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

IV. DISCUSSION

Section 1983 provides a private remedy for a deprivation of a constitutional right of a citizen of the United States by any person acting under statute, ordinance, or regulation of any State. 42 U.S.C. § 1983 (2004). In his claims against defendants, plaintiff alleges assault, cruel and unusual punishment, negligence, obstruction of justice, medical malpractice, excessive force, and pain and suffering. (D.I. 2) State defendants move for summary judgment on the basis of the following: (1) plaintiff's failure to exhaust his administrative remedies under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a); (2) plaintiff's failure to state a claim against Warden Kearney; (3) all State defendants are protected against liability in their official capacity under the Eleventh Amendment; (4) defendants Cassase, Steele, and Campbell are entitled to qualified immunity. (D.I. 54) Also, defendant Whittle has moved to dismiss for failure to state a claim. (D.I. 44)

A. Failure to Exhaust Administrative Remedies

Defendants argue that plaintiff did not exhaust his administrative remedies prior to filing this action pursuant to the PLRA.[4] Before filing a civil action, a plaintiff-inmate must

[4]The PLRA provides, in pertinent part:

> No action shall be brought with respect to

exhaust his administrative remedies, even if the ultimate relief sought is not available through the administrative process. See Booth v. Churner, 206 F.3d 289, 300 (3d Cir. 2000), aff'd 532 U.S. 731 (2001). See also Ahmed v. Sromovski, 103 F. Supp.2d 838, 843 (E.D. Pa. 2000) (quoting Nyhuis v. Reno, 204 F.3d 65, 73 (3d Cir. 2000) (stating that § 1997e(a) "specifically mandates that inmate-plaintiffs exhaust their available administrative remedies"). Prison conditions have been held to include the "environment in which prisoners live, the physical conditions of that environment, and the nature of the services provided therein." Booth, 206 F.3d at 295.

In the case at bar, the record indicates that plaintiff filed a grievance form over the alleged conduct. State defendants have failed to provide clear information concerning the consequences of plaintiff's failure to file the grievance within the proper time period following the incident. Lieutenant Atallian's affidavit merely indicates that the grievance was resolved and closed due to plaintiff's transfer to Maryland. Finally, plaintiff received no response to the grievance, as

---

> prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

mandated by the grievance procedure. (D.I. 55 at A88) Consequently, the court finds that plaintiff has exhausted his administrative remedies.

B. Failure to State a Claim Against Defendant Kearney

State defendants contend that plaintiff failed to state a claim against defendant Kearney. In order to prevail under a § 1983 claim, a plaintiff must show: (1) that the defendant acted under color of state law; (2) that a federally secured right be implicated; and (3) that the defendant deprived or caused plaintiff to be deprived of that right. Sample v. Diecks, 885 F.2d 1099, 1107 (3d Cir. 1989). There can be no Eighth Amendment liability in the absence of a showing of deliberate indifference on the part of the defendant as to whether the plaintiff suffers an unjustified deprivation of his liberty. Id. at 1110. A defendant in a civil rights action must have personal involvement in the alleged wrongs. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). "Allegations of personal direction or of actual knowledge and acquiescence" are adequate to demonstrate personal involvement. Id. Such allegations are required to be "made with appropriate particularity." Id. Plaintiff's complaint states no facts to suggest any personal involvement in, or knowledge of and acquiescence to, the alleged incidents by defendant Kearney. Moreover, plaintiff stated in his deposition that he named Kearney as a defendant solely because he is the

prison warden.[5] (D.I. 55 at A12) Therefore, defendant Kearney is entitled to summary judgment.

C. Eleventh Amendment Immunity

State defendants contend that they cannot be held liable in their official capacities under the Eleventh Amendment. "[I]n the absence of consent, a suit [in federal court] in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). This preclusion from suit includes state officials when "the state is the real, substantial party in interest." Id. at 101 (quoting Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945)). "Relief sought nominally against an [official] is in fact against the sovereign if the decree would operate against the latter." Id. (quoting Hawaii v. Gordon, 373 U.S. 57, 58 (1963)). A State, however, may waive its immunity under the Eleventh Amendment. Such waiver must be in the form of an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." Ospina v. Dep't of Corrs., 749 F.Supp. 572, 578 (D. Del. 1990) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985)). The State of Delaware has not consented to plaintiff's suit or

[5]Plaintiff also stated in his deposition that he was not alleging any involvement on the part of Kearney. (D.I. 55 at A12)

waived its immunity under the Eleventh Amendment. To the extent plaintiff alleges claims against State defendants in their official capacities, state defendants are entitled to summary judgment.

D. Qualified Immunity

State defendants Cassase, Steele, and Campbell contend that they cannot be held liable in their individual capacities under the doctrine of qualified immunity. Government officials performing discretionary functions are immune from liability for civil damages when their conduct does "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A right is "clearly established" when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987); accord In re City of Philadelphia Litig., 49 F.3d 945, 961 (3d Cir. 1995).

When analyzing a qualified immunity defense, the court must first ascertain "whether plaintiff has [alleged] a violation of a constitutional right at all." Larsen v. Senate of the Commonwealth of Pa., 154 F.3d 82, 86 (3d Cir. 1998). Next, the court must inquire whether the right was "'clearly established' at the time the defendants acted." In re City of Philadelphia

Litig., 49 F.3d at 961 (quoting Acierno v. Cloutier, 40 F.3d 597, 606 (3d Cir. 1994)). Finally, the court must determine whether "'a reasonable person in the official's position would have known that his conduct would violate that right.'" Open Inns, Ltd. v. Chester County Sheriff's Dep't, 24 F. Supp.2d 410, 419 (E.D. Pa. 1998) (quoting Wilkinson v. Bensalem Township, 822 F. Supp. 1154, 1157 (E.D. Pa. 1993) (citations omitted)). If, on an objective basis, "'it is obvious that no reasonably competent [official] would have concluded that [the actions were lawful],'" defendants are not immune from suit; however, "'if [officials] of reasonable competence could disagree on this issue, immunity should be recognized.'" In re City of Phila. Litig., 49 F.3d at 961-62 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

In the case at bar, plaintiff has alleged that defendants used excessive force against him during the November 27, 2001 incident. Plaintiff, however, has been found guilty of assaulting a correctional officer in an administrative hearing relating to this incident. Most significantly, plaintiff entered a plea of no contest in State Court to assault in the third degree, another charge relating to this incident. The law is clear that correctional officers are permitted by law to use force against an inmate to preserve order, to prevent injury to another person, and to enforce the procedures or regulations of the facility. An objective view of the record demonstrates that

officials "of reasonable competence could disagree" as to whether the force used by these defendants against plaintiff, an assaultive inmate, was excessive under the circumstances. Therefore, the court will grant defendants' motion for summary judgment in this regard.

E. Failure to State a Claim Against Defendant Whittle

Defendant Whittle contends that plaintiff failed to state a claim against her. Personal involvement by a defendant is essential in a civil rights action. See Rode, 845 F.2d at 1207. "Allegations of personal direction or of actual knowledge and acquiescence" are adequate to demonstrate personal involvement. Id. Such allegations are required to be "made with appropriate particularity." Id. Plaintiff's complaint states no facts to suggest any personal involvement in, or knowledge of and acquiescence to, the alleged incidents by defendant Whittle.[6]

Plaintiff also alleges defendant Whittle violated his Eighth Amendment right to adequate medical care. To state a violation of the Eighth Amendment right to adequate medical care, plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976); accord White v. Napoleon, 897

[6]The only mention of defendant Whittle is in plaintiff's deposition where he states he was examined by her after the first incident, and in plaintiff's complaint, where he listed defendant Whittle as an additional defendant. (D. I. 2; D.I. 55 at A10)

F.2d 103, 109 (3d Cir. 1990). Plaintiff must demonstrate: (1) that he had a serious medical need; and (2) that the defendant was aware of this need and was deliberately indifferent to it. See West v. Keve, 571 F.2d 158, 161 (3d Cir. 1978); see also Boring v. Kozakiewicz, 833 F.2d 468, 473 (3d Cir. 1987). Either actual intent or recklessness will afford an adequate basis to show deliberate indifference. See Estelle, 429 U.S. at 105.

The seriousness of a medical need may be demonstrated by showing that the need is "'one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention.'" Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (quoting Pace v. Fauver, 479 F. Supp. 456, 458 (D.N.J. 1979)). Moreover, "where denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious." Id.

As to the second requirement, an official's denial of an inmate's reasonable requests for medical treatment constitutes deliberate indifference if such denial subjects the inmate to undue suffering or a threat of tangible residual injury. Id. at 346. Deliberate indifference may also be present if necessary medical treatment is delayed for non-medical reasons, or if an official bars access to a physician capable of evaluating a prisoner's need for medical treatment. Id. at 347. However, an

official's conduct does not constitute deliberate indifference unless it is accompanied by the requisite mental state. Specifically, "the official [must] know . . . of and disregard . . . an excessive risk to inmate health and safety; the official must be both aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). While a plaintiff must allege that the official was subjectively aware of the requisite risk, he may demonstrate that the official had knowledge of the risk through circumstantial evidence and "a fact finder may conclude that a[n] . . . official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.

The law is clear that mere medical malpractice is insufficient to present a constitutional violation. See Estelle, 429 U.S. at 106; Durmer v. O'Carroll, 991 F.2d 64, 67 (3d Cir. 1993). Prison authorities are given extensive liberty in the treatment of prisoners. See Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979); see also White, 897 F.2d at 110 ("[C]ertainly no claim is stated when a doctor disagrees with the professional judgment of another doctor. There may, for example, be several acceptable ways to treat an illness."). The proper forum for a medical malpractice claim is

in state court under the applicable tort law. See Estelle, 429 U.S. at 107.

In the case at bar, plaintiff's allegations of mere negligence and medical malpractice do not qualify as a violation of the Eighth Amendment right to adequate medical care, given plaintiff's further treatment within days of the incidents at issue. Therefore, defendant Whittle is dismissed as a defendant in this action.

V. CONCLUSION

For the reasons stated, the court shall grant in part State defendants' motion for summary judgment and shall grant defendant Whittle's motion to dismiss for failure to state a claim. An appropriate order shall issue.

FOR THE DISTRICT OF DELAWARE

WARDELL L. GILES	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 02-1674-SLR
	)	
	)	
RICK KEARNEY, DEAN J. BLADES, GARY CAMPBELL, AMY WHITTLE, ROBERT J. CASSASE, SGT. CHARLES STEELE, SGT LLOYD, C/O JUSTICE, C/O MILLIGAN, and C/O ACKENBRACK,	)	
	)	
Defendants.	)	

O R D E R

At Wilmington, this 28th day of June, 2004, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. State defendants' motion for summary judgment (D.I. 54) is granted in part and denied in part.

a. It is granted with respect to defendant Kearney.

b. It is granted as to plaintiff's claims against defendants Blades, Campbell, Cassase, Steele, Lloyd, Justice, Milligan and Ackenbrack in their official capacities.

c. It is granted as to plaintiff's claims against defendants Cassase, Steele and Campbell in their individual capacities, on the basis of qualified immunity.

d. It is denied as to the remaining defendants in their individual capacities.

2. Defendant Whittle's motion to dismiss for failure to state a claim (D.I. 44) is granted.

Sue L. Robinson
United States District Judge